

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of Petition of the SBC Companies )  
For Forbearance from Regulation as a Dominant ) CC Docket No. 98-227  
Carrier for High Capacity Dedicated Transport )  
Services in Specified MSAs )

To: The Commission

**OPPOSITION OF  
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"),<sup>1</sup> by its attorneys, hereby opposes the petition of SBC Communications, Inc., on behalf of Pacific Bell, Nevada Bell and Southwestern Bell Telephone Company ("SBC" or collectively, the "SBC Companies"), for forbearance from regulation as a dominant carrier in the provision of high capacity dedicated transport services in 14 metropolitan statistical areas ("MSAs") in which the SBC Companies operate as the incumbent local exchange carrier.<sup>2</sup> Specifically, the SBC Companies request forbearance from enforcement of any Commission Rules affecting high capacity dedicated transport services that apply to the SBC Companies but not to their competitors, including Part 61 tariffing rules and Part 69 access charge rules.

<sup>1</sup> CompTel is an industry association representing more than 250 providers of competitive telecommunications services.

<sup>2</sup> *Pleading Cycle Established, Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas*, CC Docket No. 98-277, Rel. December 8, 1998. The MSAs in which SBC seeks relief are: Little Rock, Arkansas; Los Angeles, California; Sacramento, California; San Diego, California; San Francisco, California; San Jose, California; St. Louis, Missouri; Reno, Nevada; Oklahoma City, Oklahoma; Austin, (continued...)

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CompTel strongly opposes SBC's petition for forbearance from dominant regulation. As discussed below, SBC fails to establish a record to show that the statutory criteria for forbearance are satisfied. To the contrary, SBC's petition clearly demonstrates that the SBC Companies continue to dominate the market for high capacity dedicated transport services in each of the 14 MSAs for which relaxed regulatory treatment is requested. Accordingly, the criteria for forbearance are not met and the Commission must deny the SBC Companies' request for reclassification as non-dominant carriers.

**I. SBC FAILS TO DEMONSTRATE THAT FORBEARANCE IS REQUIRED UNDER SECTION 10 OF THE 1996 ACT**

The three-part test set forth by Congress in Section 10 requires the Commission to premise forbearance on a finding that enforcement of a statute or regulation is no longer necessary to guard against discriminatory behavior, protect consumers and further the public interest.<sup>3</sup> Specifically, pursuant to Section 10(a) of the Telecommunications Act of 1996 (the "1996 Act"), the Commission may grant SBC's request for forbearance from dominant carrier regulation only upon a finding that:

- (1) enforcement of dominant carrier regulations is not necessary to ensure that SBC's charges and practices are just, reasonable and nondiscriminatory;
- (2) enforcement of dominant carrier regulations is not necessary to protect consumers; and
- (3) forbearance from enforcing dominant carrier requirements is consistent with the public interest.<sup>4</sup>

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(...continued)

Texas; Dallas/Ft. Worth, Texas; El Paso, Texas; Houston, Texas; and San Antonio, Texas.

<sup>3</sup> See 47 U.S.C. §§ 160(a)-(b).

<sup>4</sup> *Id.* at 160(a)(1)-(3).

In addition, in determining whether forbearance is in the public interest under subsection (3), the Commission must consider whether forbearance will promote competitive market conditions and otherwise enhance competition among carriers in the 14 MSAs.

Inherent in each prong of the Section 10 forbearance test is a Congressional charge that the Commission find that enforcement of the statute, rule or regulation at issue is no longer necessary because the goals set forth therein already have been achieved. SBC, in its petition, fails to demonstrate any changed circumstances in the current regulatory environment that would warrant forbearance under the statute. Instead, the SBC petition clearly demonstrates that the SBC Companies continue to dominate the market for high capacity dedicated transport services and control monopoly local bottleneck facilities in the fourteen MSAs at issue in this proceeding. As a result, SBC has the unique ability and incentive to engage in cross-subsidization and other discriminatory behavior to the detriment of competition and ultimately, consumers. Therefore, SBC has not met the statutory criteria for forbearance and its petition must be rejected.

## **II. SBC MAINTAINS MARKET POWER IN EACH OF THE 14 MSAs FOR WHICH RELIEF FROM DOMINANT REGULATION IS REQUESTED**

As recognized by SBC in its petition for forbearance,<sup>5</sup> in order to grant the relief requested, the Commission must find that SBC lacks market power in each MSA for which non-dominant classification is requested. Market power exists when a carrier has the ability to raise or maintain prices above costs, control prices or exclude competition.<sup>6</sup> Market power also exists

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<sup>5</sup> See *Petition of the SBC Companies for Forbearance* at 7 (“Petition”).

<sup>6</sup> See *Comsat Corporation; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulations and for Reclassification as a Non-Dominant Carrier; Policies and Rules for Alternative Incentive* (continued...)

when a carrier has sufficient control over the underlying facilities to enable it to discriminate against competing carriers.<sup>7</sup> When a carrier has market power, particularly when the carrier maintains a high market share and control of monopoly bottleneck facilities, the Commission has consistently imposed dominant carrier regulations.

SBC's entire argument for forbearance rests solely on the claim that it has lost at least 25% of the market share in each of the 14 MSAs for which non-dominant classification is requested. Granted, despite the ILEC's resistance, competition has begun to be introduced in SBC's high capacity services market. Notwithstanding, the SBC Companies still maintain a supra-competitive share of the market for high capacity dedicated transport services. By SBC's own admission, its market share in some MSAs has declined by only 25 percent, a clear indication that competition is still in its infancy. Even in markets such as Dallas-Ft. Worth and San Francisco, where SBC claims to have lost more than 50% of the market, the company still retains a significant control of the market share (over 49%).<sup>8</sup> These numbers are disturbingly high, particularly given SBC's legacy as a monopoly service provider and its continuing

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*Based Regulation of Comsat Corporation; Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services; Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private-Line, and Video and Audio Services; Panamsat Corporation; Petition to Reopen Changes in the Corporate Structure and Operations of Communications Satellite Corporation*, 1998 LEXIS 1974 ¶ 66 (April 24, 1998) ("Comsat Order").

<sup>7</sup> See *ntta.com*; *Application for Authority Under Section 214 of the Communications Act of 1934, as Amended, to Resell Non-Interconnected Private Line Services between the United States and Japan*, 1998 Lexis 313 at ¶ 6 (January 26, 1998). In addition to market share, the Commission's market power analysis focuses on: (1) supply elasticity of the market; (2) demand elasticity of the customers; and (3) the carrier's cost structure, size and resources.

<sup>8</sup> For example, in San Francisco, the other 50% market share is split among several competitors, including WorldCom/MCI, TCG, Nextlink, ICG and TCG, giving SBC a huge advantage vis-à-vis its individual competitors. Likewise, in the Dallas-FortWorth MSA, SBC's competitors include WorldCom/MCI, TCG and e.spire.

monopoly control over the broader local exchange bottleneck facilities as well as the facilities used to provide high capacity services.

Forbearance from dominant carrier regulations cannot be brought about due to a mere decline in market share, particularly when the decline is so modest compared to historical levels. Rather, forbearance may be justified only when structural changes in the market show the incumbent LEC to be on a competitive par with other competitors. Even SBC concedes that reclassification as non-dominant is warranted only where robust competition has been realized.<sup>9</sup> In no instance, has the Commission found a mere decline in market share to equal widespread competition or even to be *prima facie* evidence of such competition. The Commission, however, has established that control of bottleneck facilities is *prima facie* evidence of market power,<sup>10</sup> a fact completely ignored by SBC in its petition. Thus, as long as SBC has market power over high capacity facilities, it would be premature to reclassify SBC as a non-dominant carrier for high capacity dedicated transport services.

### **III. FORBEARANCE MAY BE GRANTED ONLY UPON A SHOWING OF LOSS OF MARKET POWER THROUGHOUT EACH MSA**

SBC fails to demonstrate that there are alternative facilities providers throughout the various geographic areas within each MSA. Yet, SBC is seeking deregulation for the entire MSA, not just those areas where it faces competition from alternative network providers. As CompTel has stated previously, the Commission must deny any requests for forbearance from dominant regulations unless the ILEC clearly demonstrates that it has lost market power

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<sup>9</sup> See *Petition* at 29.

<sup>10</sup> See *Comsat Order* at ¶ 9.

throughout the entire MSA.<sup>11</sup> In this instance, SBC's market study provides no insight as to whether SBC's decline in market power is limited to specific geographic areas within the MSA or throughout the entire MSA. As a result, it must be presumed that there are significant geographic areas within the MSAs where SBC remains the monopoly service provider. In those circumstances, CompTel submits that it would be imprudent for the Commission to grant SBC's requests for relaxed regulatory treatment, particularly at this infancy stage of competition.

SBC claims that, through collocation, competitors in the 14 MSAs could quickly expand and build-out facilities to accommodate new demand in a relatively short period of time.<sup>12</sup> These claims are mere speculation. The truth is SBC lacks reliable information to forecast accurately the cost or timing of the CLECs' build-out of existing facilities. Moreover, collocation has been difficult and, in many instances, unreasonably expensive to implement. Often, the information needed to determine the location and type of collocation required is difficult to obtain. Even where a CLEC has adequate information for pre-ordering, the construction of the collocation equipment can take three months or more, assuming there is space available in the desired central office.

Rather than accept SBC's unsubstantiated predictions of imminent facilities-based competition, CompTel urges the Commission to adopt a show-me approach and require SBC to demonstrate actual (as opposed to theoretical) facilities-based competition in each MSA for which reclassification is requested. Indeed, if SBC is granted forbearance from dominant regulation prematurely, SBC's predictions of full-fledged facilities-based competition may never

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<sup>11</sup> See *Opposition of the Competitive Telecommunications Association, In the Matter of the Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 at 7 (filed Oct. 7, 1998).

<sup>12</sup> See *Petition* at 9.

come to fruition. If SBC is willing and able to charge below-cost rates for deregulated high capacity services, the CLECs currently operating in SBC's MSAs may be reluctant to invest additional scarce capital in those markets because they can obtain better returns by investing capital in other markets where expansion is needed with equal or greater urgency. As a result, SBC customers will be less likely to benefit from the selection of carriers and lower prices that arise from competition if the Commission grants SBC's request for forbearance.

#### **IV. RELAXED REGULATORY TREATMENT WOULD ALLOW SBC TO ENGAGE IN CROSS-SUBSIDIZATION AND OTHER DISCRIMINATORY BEHAVIOR**

##### **A. SBC Would Engage in Harmful Cross-Subsidies**

Reclassification as a non-dominant carrier would provide SBC ample opportunity to engage in cross-subsidization, especially where competition is not present throughout an entire MSA. The underlying network that SBC uses to provide high capacity services is the exact same network it uses to provide monopolistic local exchange and exchange access services. Control over such facilities provides SBC with both the opportunity and incentive to engage in harmful cross-subsidies.

One group that likely would suffer from cross-subsidies is small interexchange carriers ("IXCs"). As CompTel has stated many times in the past, incumbent LECs offer two types of transport – direct-trunked and tandem-switched transport – over the same interoffice transport network.<sup>13</sup> Small IXCs depend upon SBC's tandem-switched transport for a high percentage (in some cases 100%) of their traffic, while the largest IXCs can use direct-trunked

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<sup>13</sup> See, e.g., *Expedited Petition for Reconsideration of Competitive Telecommunications Association; In re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72 at 18 (Filed July 11, 1997).

transport for a substantial percentage of their traffic in the SBC territories. In its petition, SBC is asking to have direct-trunked transport deregulated, implicitly conceding that it retains market power over tandem-switched transport. Were the Commission to grant SBC's request, SBC would have both the opportunity and incentive to use its captive tandem-switched customer base to cross-subsidize some or all of its direct-trunked transport offerings in the various MSAs. This would result in even higher rates for tandem-switched transport users and an uneconomic access cost advantage for the largest IXCs who can benefit from SBC's direct-trunked transport offerings. Such cross-subsidies would undermine competitive conditions in the markets for interexchange and one-stop shopping services and result in higher rates and fewer choices for consumers.

**B. SBC Could Use This Opportunity to Circumvent Section 251(c) of the 1996 Act**

Forbearance from dominant regulation also would give SBC an additional incentive not to comply with Section 251(c) of the 1996 Act. As the Commission is fully aware, SBC has refused to open its local monopoly to competition in compliance with Section 251 of the 1996 Act and the Commission's Rules implementing that section. Deregulating SBC's high capacity services would only give the SBC Companies another reason to avoid complying with the market-opening provisions in the 1996 Act. CompTel believes that in light of SBC's poor track record, forbearance from dominant carrier regulation would in no way enhance competition and would only provide SBC with an additional tool to thwart competition in the local services market.

As demonstrated by the multiple petitions filed by SBC requesting relaxed regulation, SBC will stop at nothing to maintain its monopoly-driven market share in the high



capacity dedicated transport market. Although SBC claims to have lost market power, the evidence presented in this proceeding only demonstrates a modest decline in market share. More important, SBC continues to maintain control over bottleneck facilities used to provide high capacity services, the most telling indicator of market power. Thus, until SBC can demonstrate a real loss of market power, in particular a loss of monopoly control over bottleneck facilities, the Commission must reject its requests for reclassification as a non-dominant carrier.

Finally, CompTel is concerned that SBC's request for relief is overbroad. While SBC's petition appears to be limited to the high capacity dedicated transport market, various statements in the petition could be interpreted to extend beyond that market segment. For example, SBC requests that the Commission forbear from enforcing any of its access charge rules that it does not also enforce on other competitors.<sup>14</sup> Taken literally, grant of this request would extend beyond the scope of high capacity services that operate at DS1 or higher transmission speeds and also include all types of switched access. Thus, CompTel believes that it is important that the Commission clearly establish the scope of this proceeding and limit its analysis to high capacity dedicated transport services that operate at DS1 and higher transmission speeds.

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<sup>14</sup> *See Petition* at ii.

**V. CONCLUSION**

For the reasons stated herein, CompTel submits that the Commission should deny SBC's petition for forbearance from regulation as a dominant carrier in the fourteen MSAs.

Respectfully submitted,

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Dated: January 21, 1999

## CERTIFICATE OF SERVICE

This is to certify that I have on this 21st day of January 1999, served copies of the foregoing **OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION** upon all known parties of record, by depositing same in the United States Mail, addressed as follows:

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